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No. 83-_____

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1983

JOSEPH HOWARD KIRK, III,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
FOR THE COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Solicitor General
Department of Justice
Washington, D.C. 20530

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QUESTION PRESENTED

1. Did the Court of Appeals err in applying this court's decisions when it affirmed a trial judge, who had prevented the defendant from inquiring into the connection between a government witness and the government, on the grounds that the witness' safety would be jeopardized?

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OPINIONS BELOW

The decision of the court of appeals included no opinion (Pet. App. A). The oral ruling of the trial judge is included in the transcript of witness Morin's testimony.

The Court of Appeals' Judgment was rendered July 12, 1983. The Petition for Rehearing was denied September 1, 1983.

STATUTES INVOLVED

The relevant law is the VI Amendment to the United States Constitution, which states in part:

In all criminal prosecutions the accused shall enjoy the right to a speedy and

public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

A. Legal Proceeding

Joseph Howard Kirk was convicted of two counts of tax fraud, in violation of Title

26, USC Section 7201, for the years 1977 and 1978.

After the March 8, 1982, jury verdict, Mr. Kirk appealed.

On July 12, 1983, the Eleventh District Court of Appeal denied a direct appeal.

On September 1, 1983, the Eleventh District Court of Appeal denied the Petition for Rehearing.

B. Facts Relevant to Petition

Mr. Joseph Kirk, during the course of a two week trial, was accused by the government expert witness of defrauding the government out of \$13,853.49 in 1977 and \$91,855.42 in 1978.

Since the sums in question were not large amounts of money, it can readily be

appreciated that when a government witness, named John Morin, took the stand as a rebuttal witness and testified that four years previously he discussed in the defendant's presence the illegal laundering of 50 million dollars, the impact of this hearsay conversation must have been devastating.

It was testimony that was easy to understand, and which was so inflammatory it alone might have justified a conviction.

The testimony of Mr. Morin related a conversation between Mr. Morin, a lawyer named Joseph Padawer, and Joseph Kirk.

The defense attorney objected to Mr. Morin testifying about the whole conversation between Mr. Morin and a third party. The trial judge sustained the objection.

Nevertheless, Mr. Morin when asked did testify about hearing a lawyer, named Mr.

Padawer mentioning that he was considering laundering 50 million.

When Mr. Morin finished his testimony, the defense attorney immediately tried to inquire into Mr. Morin's relationship to the government.

The government objected to this question, and at a bench conference, the government argued that that "area" of questioning should not be allowed, because the witness had 1) been threatened, 2) it was irrelevant and 3) it was outside the scope of cross-examination. The government argued that Mr. Morin's life may have been in danger, and therefore the defendant should not be allowed to inquire into that area.

The exchange went as follows from the trial transcript of John Morin's testimony pg. 76, line 10 to pg. 80, line 13.

BY MR. EDMUND:

Q. Mr. Morin, my name is Jack Edmund.

A. Yes.

Q. Mr. Morin, can you tell me, sir, how your information came to the attention of the Government.

MR. COWEN: Objection, Your Honor.

May we approach the Bench?

THE COURT: All right.

(At the Bench.)

MR. COWEN: This is precisely the area I was concerned about.

This witness has been threatened once, and how this knowledge, how this information came to the attention of the Government I would submit is irrelevant and outside the scope of --

MR. EDMUND: Your Honor please --

MR. COWEN: Excuse me. May I just conclude.

THE COURT: Sure.

MR. COWEN: This witness expressed to me very grave concern about that coming out.

He is afraid, primarily. He received a threat two-and-a-half hours after his name came out here.

Mr. Olivetti died, was murdered three months ago.

I am sure it is not news at all to the Court in this kind of business that things can sometimes become violent.

I don't understand what relevance it would be how it came out.

Does Mr. Edmund --

MR. EDMUND: I don't know anything about Mr. Morin. I only know what I could

get from my client.

When Morin's name came up I ran into a pure dead end.

Nor, I don't know a thing about his background. I don't know of anything that I could impeach upon. I don't even know if he is a criminal.

I assume I can ask him those kind of questions without objection, but --

THE COURT: What are you afraid of? I don't know what, how the information came to the Government --

MR. EDMUND: I don't know. I have no knowledge.

It is just interesting how a man of the supposed status that he appears to be at this time, --

THE COURT: He testified before the Grand Jury.

MR. EDMUND: Yes. What I am trying to find out is if the Government ever made a connection between him and the Grand Jury investigation in the first instance.

This is a man not even from here whose name comes up in the Grand Jury testimony, and --

THE COURT: I will sustain the objection to that if that is what you are asking him.

MR. EDMUND: That is what I am asking him, sir.

THE COURT: I don't think that it really tends to show his credibility or detract from it.

MR. EDMUND: Would Your Honor take a statement in camera from Mr. Cowen regarding how Mr. Morin's participation came to the attention of the Government and make a

determination if it might affect his credibility?

THE COURT: All right. I will do that.

I think I will have Mr. Morin present during the camera statement so I can explore it if I think it is appropriate.

MR. EDMUND: Thank you, Your Honor.

THE COURT: All right.

(In open Court.)

THE COURT: Take the Jury out for a minute, please.

(The Jury left the Courtroom at 3:37 p.m.)

MR. COWEN: Your Honor, may I have Mr. Edwards who is Case Agent regarding another case present?

THE COURT: Which is Mr. Edwards?

MR. COWEN: He is the gentlemen with the beard in the back, an IRS Special Agent.

THE COURT: There is no objection to that, is there?

MR. EDMUND: No, Your Honor.

Do you want us out of the Court-room?

THE COURT: That is what you asked for.

MR. EDMUND: I didn't know whether you were going to have a Bench conference or what?

I explained to them this was in camera and we have to go outside.

Thank you, Your Honor.

THE COURT: Mr. Edmund, stay right out there because this isn't going to be very long, I don't think, so we can get

things moving.

MR. EDMUND: Yes, sir.

THE CLERK: Do you want me in here or outside?

THE COURT: You can stay here and the Marshal can stay.

(Whereupon, an in camera proceeding was had from 3:40 p.m. until 3:50 p.m., after which the following proceedings were had in open Court.)

THE COURT: Mr. Edmund, based on the in camera examination which I conducted which will be sealed as a part of this record --

MR. EDMUND: Yes, sir.

THE COURT: -- I conclude that a truthful answer or answers to your question would not impeach the witness.

And, secondly, it could lead to

information highly derogatory of your client, derogatory in the sense it could be prejudicial. I don't mean derogatory to him personally, but it could be prejudicial to your client.

So, I am going to sustain the objection to the question.

REASONS FOR GRANTING THE WRIT

The trial judge was wrong, in curtailing cross-examination, and the Appellate court erred in applying this court's cases dealing with the confrontation clause when it affirmed the conviction.

It is settled that the confrontation clause of the Sixth Amendment protects the right of cross-examination of adverse witnesses by the defense. Davis v. Alaska, 415

U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); Alford v. United States, 282 U.S. 687, 51 S. Ct. 218, 75 L. Ed. 624 (1931).

The court in Brookhart v. Janis, 384 U.S. 1, 3; 86 S. Ct. 1245, 1246, 16 L. Ed. 2d 314 and Smith v. Illinois, 390 U.S. 129, 131, 88 S. Ct. 748, 750, 19 L. Ed. 2d 956 (1968) ruled that the denial of the right of effective cross-examination is a constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.

In Greene v. McElroy, 360 U.S. 474, 496, 79 S. Ct. 1400, 1413, 3 L. Ed. 2d 1377 (1959) it was established that the "exposure of a witness' motivation in testifying is a proper and important function of the right of cross-examination."

In Davis v. Alaska, 94 S. Ct. 1105

(1974), the court confronted a situation in which it had to weigh the state's claim that it wanted to protect the confidentiality of a juvenile witness against the right of the defense to ask questions which would reveal the bias and prejudice on the part of a government witness, because of his being on probation.

The court found that the lower court's attempt to limit cross-examination violated the Confrontation Clause, which required that the defendant be allowed to impeach a witness by questioning directed at possible bias deriving from the witness' probationary status as a juvenile delinquent.

The court found that the "partiality of a witness is subject to exploration at trial, and is "always relevant as discrediting the witness and affecting the witness

and affecting the weight of his testimony."

3 A J. Wigmore, Evidence 940, p. 775

(Chadbourn rev. 1970)." Davis v. Alaska, 94 S. Ct. 1105, 1110.

In Smith v. Illinois, and Alford v. United States, 51 S. Ct. 218, interference with questions about a prosecution witness' background were considered fundamental violations of a defendant's right to place a witness in his proper setting so the weight of his testimony and his credibility can be evaluated by a jury.

Specifically, and of special importance to the present case, Justice White and Marshall in concurring argued that even if the trial judge felt that a witness' personal safety was jeopardized by an inquiry, that as long as a question was a normally permissible one, the prosecutor should not

be allowed to prevent the asking of a question unless the prosecutor makes some showing of why the witness should be excused from answering a question.

The defense attorney was prevented from eliciting the narrative testimony necessary to develop this background perspective.

It is not proper for the trial court to substitute its judgment for the jury's to decide whether this tactic would have successfully impeached the prosecution witness.

Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 1111 (1974), 39 L. Ed. 2d 347.

The jury should have had the benefit of this defense theory, especially when impeachment was vital to the defense to counter a prosecution bombshell witness whose devastating disclosure in rebuttal was obviously

calculated to conclude the prosecution's case on a dramatic note.

The prosecutor made no evidentiary showing to justify his claim that his witness was really in danger if he responded to the defense inquiry.

Further, a common sense analysis reveals that this claim is obviously insincere. Once Mr. Morin revealed his name and his identity, anyone who wished him harm would have all the information they needed to threaten him.

Revealing how Mr. Morin's information came to the attention of the government would not have increased danger to his personal safety in any imaginable way. Certainly, the U.S. Attorney made no specific at-

tempt to explain how the answer would endanger Mr. Morin's safety, beyond his assertion. Since the testimony was taken in Camera, only the Court had an opportunity to evaluate if the objection was meaningful.

The defense question went right to the heart of the relationship between a government informer and the government. The defense is not restricted to asking a witness if they have made a deal with the government, nor to asking if they are biased. The defense has a right to draw out the facts and circumstances that would allow a jury to decide for themselves if a witness is testifying under duress, bias or in hope of favor.

The court directly prevented this investigation of the factual background of a devastating prosecution witness' relation to the government. The U.S. Attorney, under the


guise of protecting a witness' safety, was allowed to shield him from the only kind of cross-examination which would have been likely to reveal his motives- good or bad - for testifying.

Cross-examination about the way the government acquired a witness' testimony was a vital tool the defense had a right to use.

The trial Court's ruling was a violation of the Confrontation Clause of the Sixth Amendment.

CONCLUSION

The Petitioner, for the reason set forth above, asks this Court to grant a Writ of Certiorari.


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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5333

D.C. Docket No. 81-00070

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOSEPH HOWARD KIRK, III,
Defendant-Appellant.

Appeal from the United States District Court
For the Middle District of Florida

(July 12, 1983)

Before TJOFLAT, VANCE and CLARK, Circuit
Judges.

PER CURIAM:

AFFIRMED. See Circuit Rule 25.

ISSUED AS MANDATE: SEP. 21, 1983

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5333

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSEPH HOWARD KIRK, III,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Middle District of Florida
- - - - -

ON PETITION FOR REHEARING
(SEP. 1 - 1983)

Before TJOFLAT, VANCE and CLARK, Circuit
Judges.

PER CURIAM:

IT IS ORDERED that the petition for
rehearing filed the above entitled and num-
bered cause be and the same is hereby Denied.

ENTERED FOR THE COURT:

United States Circuit Judge